being a crime, is a tort, for which a civil action for damages would lie. No such civil action can lie for breaking a statute, unless the statute itself creates a civil liability, and that was not the fact in the principal case. No more should equity have taken control except for the civil wrong. The statute merely created a right in the public, and only the Attorney-General should take advantage of it, — and that in a criminal proceeding. The business of the court of equity is not the enforcement of the penal code, unless the legislature which created the crime gave the court the power to control it by injunction. Such a course is taken in some of our States, although it puts a severe strain upon the machinery of courts; but the course was not taken by Parliament in the statute in question, and equity should have looked only at the tort. A tort there undoubtedly was; and upon that the injunction should have been based.

RECENT CASES.

AGENCY — INSURANCE POLICIES — WAIVER OF CONDITIONS. — *Held*, that an agent of a life insurance company has power, before delivery, to waive a condition that the policy shall be void unless the first premium is paid during the lifetime of the insured, notwithstanding the policy expressly states that he has no such power. *John Hancock Mut. Life Ins. Co.* v. *Schlink*, 51 N. E. Rep. 795 (Ill.).

The case is in accord with the great weight of authority. It is generally held that a life insurance agent can, before delivery of the policy, waive any of the conditions therein contained, although there is an express statement in the policy that he has no such power, provided, of course, that the insured has no knowledge of this limitation. *Dilleber* v. *Knickerbocker Life Ins. Co.*, 76 N. Y. 567; *Piedmont and Arlington Life Ins. Co.* v. *Young*, 58 Ala. 476. This, however, is merely a question as to the extent of the incidental powers of the agent, and in all cases the jury should decide whether a reasonable man knowing nothing of this express limitation would say it was within the scope of the agent's authority to waive the particular condition. If in such a case, the agent waives or varies the terms of the policy after delivery, contrary to the express stipulations therein contained, the company will not be bound, as the insured will be presumed to know that the agent is not authorized to make such a change. *Quinlan* v. *Providence Washington Ins. Co.*, 133 N. Y. 356.

BANKRUPTCY — VOLUNTARY ASSIGNMENTS VOIDABLE BY TRUSTEE. — A debtor within four months of being adjudged a bankrupt made a voluntary assignment in conformity with the laws of his state. *Held*, that the assignment is voidable by the trustee in bankruptcy. *In re Gutwillig*, 90 Fed. Rep. 475 (Dist. Ct., N. Y.).

In the case of *Mfg. Co.* v. *Hamilton*, 51 N. E. Rep. 539 (Mass.), which was followed in *In re Bruss-Ritter Co.*, 90 Fed. Rep. 651, it was held that state insolvent laws were suspended by the National Bankruptcy Act. But since general assignments are not made under insolvent laws that principle does not determine the present case. However, a result different from the one reached would be subversive of the whole purpose and policy of bankruptcy legislation, since it would permit a debtor to distribute his assets in a manner other than that provided by the Bankruptcy Act. Another conclusive reason given for the decision is that the provision of the Bankruptcy Act, which makes voluntary assignments acts of bankruptcy, would be of no value to creditors, if the assignment were not voidable. A similar decision under the preceding act, and an abundant collection of authorities is to be found in the case of *Globe Ins. Co.* v. *Cleveland Ins. Co.*, 14 B. R. 311.

BILLS AND NOTES — FRAUD BY DRAWER — PAYEE'S LIABILITY TO DRAWEE. — Action brought by the drawee against the payee of a bill of exchange to recover back money paid to the defendant's collecting agent, on the ground of fraud perpetrated by the drawer on the plaintiff. The delivery by the drawer to the payee was for collection only. *Held*, that the defendants must be treated as if they were the actual purchasers of the bill, and although in no way parties to the drawer's fraud, they were liable to the plaintiff for money paid to their agent under a mistake of fact. *Eufaula Grocery Co.* v. *Missouri National Bank*, 24 So. Rep. 390 (Ala.).

The ground of the decision in this case is distinctly opposed to the well settled principle in the law of bills and notes that the rights of a *bona fide* holder for value cannot be affected by equities existing between the original obligor and obligee. *Cf. Arpin* v. *Owens*, 140 Mass. 145; *Goetz* v. *Bank of Kansas City*, 119 U. S. 551. A recovery in this suit on any ground is objectionable, in that it leaves the payee still exposed to the drawer's claim for an account of the bill deposited for collection. A suit in equity would work a more satisfactory adjustment of the various rights affected. The legal claim of the above defendants against their collecting agents for the proceeds of the bill was exercisable by them only for the benefit of the drawer. The drawer, however, was guilty of a fraud upon the plaintiff and so held for his benefit, as a constructive trustee, the product of his wrong, namely, an equitable claim against the above defendants. The plaintiff was thus entitled as a *cestui que trust* to reap the benefit of these various claims, by joining the drawer, the above defendants and their collecting agent, as parties defendant to a suit, in which the final decree would be a binding adjustment of the rights of all the parties involved.

CARRIERS — LIABILITY FOR ASSAULT BY EMPLOYÉ. — *Held*, that a carrier of passengers is liable for an assault upon a passenger by one of its employés, though the employé was not acting within the scope of his employment. *Haver* v. *Central R. R. Co.*, 41 Atl. Rep. 916 (C. A., N. J.).

The decision has the support of the great weight of American authority. Elliott, Railroads, 2578. The English courts apply to common carriers the rule of agency that a master is liable for the acts of his servant only when acting within the scope of his employment. *Walker* v. *South-Eastern Ry. Co.*, L. R. 5 C. P. 640. But reasons of policy seem to require that carriers be held to a greater liability for the acts of their servants than masters in general. The law imposes upon the carrier the duty of protecting the passenger, as far as possible, from injury, and there is a breach of that duty whether the passenger is injured by an employé or by a stranger. The complaint of the passenger in this class of cases is based upon the failure of the employé to protect him, and it may be said with accuracy that the carrier is liable for the inaction, rather than for the action of his servant.

CARRIERS — STAMP ACT — REGULATION OF CHARGES. — By Act of Congress express companies are required at every shipment of goods to issue a bill of lading with a one cent revenue stamp attached. *Held*, that a uniform increase of one cent in all express rates, regardless of the bulk of goods or the distance to be carried, is an unreasonable regulation of charges, being an attempt to shift upon the shipper a burden imposed by law upon the carrier. *Attorney-General* v. *American Express Co.*, 77 N. W. Rep. 317 (Mich.).

The Stamp Act contains no provision which expressly or impliedly prohibits an express company, which has paid the tax as specified, from reimbursing itself by an additional charge to the shipper. The carrier has a right to receive for its services a reasonable compensation, the amount of which may be determined by long usage. Hutchinson, Carriers, 2d ed., § 447. If, then, the rates in force before the passage of the Stamp Act were not unreasonable, it is hard to see how they can be adjudged unreasonable after the Act is in force, by reason of an increase in amount which is only commensurate with the additional expense inflicted by Congress on the conduct of the carrier's business. The doctrine of the principal case, which seems really to involve a forced construction of the Stamp Act, would have worked a deplorable result, had the amount of the tax been large enough to make a material diminution in the carrier's profits. See, *contra* to principal case, *Crawford* v. *Hubbell*, 89 Fed. Rep. 961 (Cir. Ct. N. Y.).

CHATTEL MORTGAGES — UNCERTAINTY IN DESCRIPTION. — An owner mortgaged fifty cows, part of a larger herd, without designating the particular animals. *Held*, that the mortgage conferred on the mortgagee the right to select the number from the herd, and was a writing, "intended to operate as a lien," within Rev. St. [1895], art. 3328. *Amory* v. *Popper*, 48 S. W. Rep. 572 (Tex., Sup. Ct.).

That a mortgage of a stated number of chattels out of a larger sum total, without special identification or description, is void as to third parties, may be regarded as settled law. *Parker* v. *Chase*, 62 Vt. 206; Jones, Ch. Mort., 4th ed., § 56. As to the exact nature of the relation created between the parties to such an instrument there seems to have been little discussion. It is clear that the mortgagee acquires no title to nor lien on particular chattels. The principal case regards him as having a power to select the property, on the ground that the instrument is to be construed most strictly against the mortgagor, and the result thus reached is as satisfactory as any. The same view seems to have been taken in *Call* v. *Gray*, 37 N. H. 428, and in *Gurley* v. *Davis*, 39 Ark. 394. It is, however, a wide stretch of the term lien to make it include such a power as this, and on that point the principal case can hardly be supported.

CONSTITUTIONAL LAW — EMINENT DOMAIN — JUST COMPENSATION. — *Held*, that when part of one's land is condemned for highway purposes, it is not unconstitutional to provide that the commissioners in fixing the compensation shall take into consideration the special benefits to the rest of his land from the improvement. *Randolph* v. *Board of Chosen Freeholders*, 41 Atl. Rep. 960 (N. J., Sup. Ct.).

In *Loweree* v. *City of Newark*, 38 N. J. Law, 151, it was held constitutional to provide that a special assessment for benefits arising from the opening of a street should be set off against any award for land taken. On the ground that it practically provided for such a set-off a statute like that in the principal case was supported in *Newby* v. *Platte County*, 25 Mo. 258. *Mangles* v. *Chosen Freeholders*, 55 N. J. Law, 88, sustained a similar statute without any resort to the taxing power, and the present case approves this conclusion. The reasoning is that the constitution simply requires just compensation to be paid when property is taken for public purposes, and that the courts cannot say that an owner has not been justly compensated if paid the difference between the value of his land before and after the taking of a part. This reasoning seems entirely sound, but many courts, probably a majority, would hold that the value of the land actually taken must be paid anyway, special benefits being considered only in estimating damage to other land not taken. *Wagner* v. *Gage County*, 3 Neb. 237.

CONSTITUTIONAL LAW — EMINENT DOMAIN — LEASE. — A tenant from year to year held over with the landlord's consent after the termination of a year, although prior thereto the State had commenced proceedings to condemn the land. Thereafter the land was condemned and the tenant claimed compensation. *Held*, that the tenant was not entitled to hold over as against the State, and therefore he cannot have compensation. *In re State House*, 41 Atl. Rep. 1004 (R. I.).

In accord is *Schreiber* v. *Chicago & Evanston R. R. Co.*, 115 Ill. 340. It is well settled that a lessee for a term of years is entitled to compensation for a taking of the property leased. *Storm Lake* v. *Iowa Falls, etc. Ry. Co.*, 62 Iowa, 218. And so a lessee under a parol lease from year to year. *Getz* v. *Philadelphia & Reading R. R. Co.*, 105 Pa. St. 547. In the principal case therefore the tenant would have been given compensation had he acquired a right to hold for another year before condemnation proceedings were begun. However, the commencement of the proceedings prior to the termination of the year for which the tenant rightfully held was notice of the intended exercise of the paramount right of the State to both landlord and tenant. Therefore a renewal of the lease by the mutual consent of the landlord and tenant should be taken to be made with regard to the pending proceedings instituted by the State, and as terminable when the land should be finally condemned.

CONSTITUTIONAL LAW — TAXATION. — A statute authorized State loans to persons whose crops had failed the preceding year of the money needed to buy seed grain. In an action by a county to recover the amount of such a loan from the borrower, *held*, that the statute is unconstitutional. *Deering & Co.* v. *Peterson*, 77 N. W. Rep. 568 (Minn). See NOTES.

CONSTITUTIONAL LAW — UNREASONABLE SEARCHES AND SEIZURES. — An Illinois statute provided for the issue of a search warrant upon the affidavit of a manufacturer of beverages that he has reason to believe and does believe that a person, in violation of the act, is using or has used any of complainant's bottles, casks, etc. *Held*, that the statute is in conflict with that section of the Illinois Constitution which prohibits the issue of search warrants except upon probable cause supported by affidavit. *Lippman* v. *People*, 51 N. E. Rep. 872 (Ill.).

Where a statute requires a showing of probable cause, it is well settled that the act is not satisfied by a mere expression of deponent's belief unaccompanied by a declaration of the facts on which that belief is founded. *Swart* v. *Kimball*, 43 Mich. 443, 451. The law is the same where the requirement is found in a constitution, but where no statute has sanctioned such opinion evidence. *Johnston* v. *United States*, 87 Fed. Rep. 187. In no former case, however, has a legislative enactment been held unconstitutional because declaring an expression of belief to be equivalent to proof of probable cause. But, although the authorities cited are perhaps not precisely in point, the present decision seems clearly correct on principle. To hold otherwise would conflict with common-law notions as to the value of hearsay and opinion evidence, and would deprive the constitutional guaranty of much of its usefulness. The court further declared the statute in question objectionable as authorizing a search warrant for merely private ends. *Robinson* v. *Richardson*, 3 Gray, 454. But surely the protection of property and the enforcement of a criminal statute passed for that purpose should be deemed a public object.

CONSTRUCTIVE TRUSTS. — Certain cattle mortgaged to the defendant were destroyed by a tort of a third party. The defendant, on a judgment against the tort-feasor

recovered a sum of money equivalent to his mortgage debt, and in exchange for the balance of the judgment received certain judgments which the tort-feasor held against the mortgagor. *Held*, that the plaintiff, the mortgagor, may, at his election, take the judgments against himself received by the defendant, or charge the defendant with the uncollected balance on the judgment against the tort-feasor. *Woodrum* v. *Washington National Bank*, 55 Pac. Rep. 333 (Kan., Sup. Ct.). See NOTES.

CONTRACTS — CONDITIONS — SATISFACTION OF THE PROMISOR. — The defendant employed the plaintiff to paint a pastel portrait, the contract providing that if the portrait were not satisfactory the defendant should not pay. The plaintiff then painted a portrait which the defendant rejected upon the ground that it was not satisfactory to him. *Held*, that the plaintiff has no cause of action. *Pennington* v. *Howland*, 41 Atl. Rep. 891 (R. I.). See NOTES.

CONTRACTS — CONSIDERATION. — The defendant gave the plaintiff his non-negotiable note as a gift without any consideration, and the plaintiff, in reliance on the note, gave up a lucrative employment. *Held*, that the defendant is estopped to set up lack of consideration. *Ricketts* v. *Scothern*, 77 N. W. Rep. 365 (Neb.).

It is hard to find any estoppel here, since the maker of the note never represented that there was any consideration for it. Moreover, the representation to raise an estoppel must be as to an existing fact, and not in the nature of a promise. *White* v. *Ashton*, 51 N. Y. 280; *Insurance Co.* v. *Mowry*, 96 U. S. 544; *Jordan* v. *Money*, 5 H. L. Cas. 185. Yet there are many decisions to the effect that where a note is given to a college or charitable institution, and the institution expends money in consequence, the donor cannot set up lack of consideration as a defence on the note. *Church* v. *Garvey*, 53 Ill. 401; *Irwin* v. *Lombard Univ.*, 56 Ohio St. 9. But if the donee has not changed its position, the note is unenforceable. *Simpson College* v. *Tuttle*, 71 Iowa, 596; *Reimensnyder* v. *Gans*, 110 Pa. St. 17; *Miller* v. *Western College*, 52 N. E. Rep. 432 (Ill.). This must be regarded as an innovation, and it is doubtful if it has ever before been extended to a gift to a private individual. The whole doctrine is repudiated in some states. *Methodist Church* v. *Kendall*, 121 Mass. 528.

CONTRACTS — STATUTE OF FRAUDS — CONSTRUCTIVE TRUSTS. — In consideration of the conveyance of certain land by the deceased to her mother, her father, for himself and the mother, orally promised to transfer their rights in certain other land to the deceased's husband. The conveyance to the mother was made, but the parents later refused to perform their part. In a suit in equity by the husband to which the heirs of deceased were made parties, *held*, that if the parents do not carry out their agreement the land conveyed to the mother will revert to the estate. *Simons* v. *Bedell*, 55 Pac. Rep. 3 (Cal, Sup. Ct.).

The mother cannot be compelled to carry out the agreement, because it was not in writing; but if she refuses, the court correctly decide there should be a constructive trust for the heirs of grantor of the land received. It is inequitable for her to retain the consideration while refusing to carry out the contract. In England, where one has given a promise within the Statute of Frauds in return for the receipt of land or chattels, he will be compelled to give back that which he has received if he refuses to carry out the agreement. *Haigh* v. *Kaye*, 7 Ch. App. 469. In this country, generally, where land is so conveyed the courts will not compel a reconveyance, *Stevenson* v. *Chapnell*, 144 Ill. 19; but, where the point has come up, the grantor is allowed to rescind the contract and to recover the value of the land conveyed in an action for land sold. *Smith* v. *Hatch*, 46 N. H., 146. This is an anomalous doctrine, and the principal case, which is in accord with the English rule, seems to state the correct view. The Statute of Frauds is not violated, but equity thus prevents it from being used as an instrument of fraud. Even in the United States one is allowed to recover money paid, in return for a parol agreement for the conveyance of land, and to sue in trover for chattels given under a like arrangement. The principle should be the same where land is given for the promise. *Allen* v. *Booker*, 1 Stewart, 21; *Keith* v. *Patton*, 1 A. K. Marshall, 23.

CORPORATIONS — CONTRACTS. — The plaintiffs contracted with a number of persons who intended to form a corporation to build a factory for it. The factory was built and the corporation was formed and used the factory. *Held*, that it is liable on the contract. *Chicago Building Co.* v. *Creamery Co.*, 31 S. E. Rep. 809 (Ga.).

In general a corporation is not liable on the personal contracts of its promoters. *Western Screw Co.* v. *Cousley*, 72 Ill. 531. But when it has enjoyed the benefits of such contracts, it is generally held liable on them. This is sometimes put on the ground of ratification. *Whitney* v. *Wyman*, 101 U. S. 392; *Oakes* v. *Water Co.*, 143 N. Y. 430. This reasoning seems erroneous, for to have a ratification the principal for whom the agent claimed to act must have been in existence at the time the contract was made.

Kelner v. *Baxter*, 2 C. P. 174; *Abbott* v. *Hapgood*, 150 Mass. 248. The true ground for these decisions seems to be that the court will imply a novation from the acts of the parties, when the corporation has accepted the benefits of the contract, or has recognized it in its articles of association. *Howard* v. *Ivory Co.*, 38 Ch. D. 156; *McArthur* v. *Printing Co.*, 48 Minn. 319.

CRIMINAL LAW — CORPORATIONS — CONTEMPT OF COURT. — A newspaper, in the course of an article concerning a pending trial, published a statement of certain facts which could not have been shown in evidence at that trial. *Held*, that this tended improperly to influence the jury and was therefore a contempt of court. *Telegram Newspaper Co.* v. *Commonwealth*, 52 N. E. Rep. 445 (Mass.). See NOTES, 12 HARV. LAW REV. 427.

CRIMINAL LAW — EMBEZZLEMENT — JURISDICTION. — Defendant entered into a contract with X. in Polk county, whereby he agreed to sell goods in other counties in the state, and send the proceeds to X. Goods were shipped to various places in the state, where they were converted by the defendant, who refused to account for the proceeds upon his return to Polk county. *Held*, that the venue was properly laid in Polk county. *State* v. *Hengen*, 77 N. W. Rep. 453 (Iowa).

To give a county court in Iowa jurisdiction of a crime it is necessary, under the Iowa code, that some act which is an essential element of the offence should have been committed in the county. The court held that the refusal of the defendant to make an accounting in Polk county was a necessary ingredient of the embezzlement. But embezzlement by a bailee consists only of a conversion *animo furandi* of property of the bailor. McLain's An. Code of Iowa, § 5215. If the defendant had been a trustee it might well have been argued that there was no embezzlement until there was an obligation to account. In the principal case, however, the conversion concededly occurred outside of Polk county. Where venue is confined to the place of the commission of an offence, as in Iowa, it is frequently difficult to determine the jurisdiction of a crime, but it is better to leave the remedy for such a condition to the legislature than to consider as part of the offence facts which have nothing to do with it. *People* v. *Murphy*, 51 Cal. 376.

EVIDENCE — CHARACTER — CIVIL SUIT. — In an action by an engineer for damage resulting from a collision the company showed that he disregarded signals. They claimed that was asleep at his post, while the fireman testified that he was doing his duty. *Held*, that evidence that on former occasions he had slept while running his engine is inadmissible to prove negligence on his part. *Missouri K. & T. Ry. Co.* v. *Johnson*, 48 S. W. Rep. 568 (Tex., Sup. Ct.). See NOTES.

EVIDENCE — MENTAL ATTITUDE — SIMILAR ACT SHOWING SCHEME. — On the trial of an indictment for obtaining eggs by false pretences, it was proved that the prisoner had falsely represented by newspaper advertisements that he was carrying on *bona fide* a dairyman's business. *Held*, that evidence that, on two occasions within two months after the transaction in question, the prisoner had fraudulently obtained eggs from other persons by means of similar advertisements, is admissible to show a scheme to defraud. *The Queen* v. *Rhodes*, [1899] 1 Q. B. D. 77.

It is a well established rule of evidence that in the trial of criminal cases involving the proof of a special mental condition, such as a felonious intent or guilty knowledge, evidence of similar acts committed by the prisoner is admissible; that is, if they are near enough in point of time and frequent enough in number to raise a legitimate inference that the offence charged was not the result of a mere accident or mistake, but was rather an act in a premeditated line of conduct. *Reg.* v. *Francis*, 12 Cox, C. C. 612; *Commonwealth* v. *Coe*, 115 Mass. 481, 501. The principal case is interesting as being very near the line where such an inference would be of too slight weight to be of probative value. The decision seems a sensible one, however, it being proper to admit the evidence and leave to the jury the determination of what weight, if any, shall be accorded to it.

EVIDENCE — PERSONAL INJURIES — EXAMINATION BY DEFENDANT'S SURGEON. — In an action for personal injuries, the plaintiff exhibited her wounds to the jury, but refused to allow the defendant's surgeons to examine them. *Held*, that the defendant was entitled to have the plaintiff examined by experts of his own selection, in order to rebut the testimony of the plaintiff's physicians. *Chicago. etc. R. R. Co.* v. *Langston*, 48 S. W. Rep. 610 (Tex., Civ. App.).

The authorities are in hopeless conflict on this point. Many jurisdictions hold that the right of an individual to have his person free from all restraint or interference is absolute, and to compel him, in a civil suit, to undergo a physical examination is an indignity which the courts will not tolerate. *Stuart* v. *Havens*, 17 Neb. 211. A number of courts, on the other hand, maintain that when a plaintiff has once exhibited his in-

juries to the court, he has waived his right to object to a physical examination on the ground of personal inviolability. *Haynes* v. *Town of Trenton*, 123 Mo. 326. Perhaps the most satisfactory rule would be to leave the entire question to the discretion of the court, which would order an examination when the ends of justice imperatively demanded it, and would refuse when it was evident that the purpose of the defendant was merely to harass and annoy the plaintiff. *Belle of Nelson Distilling Co.* v. *Riggs*, 45 S. W. Rep. (Ky.).

EVIDENCE — PRESUMPTIONS. — On an issue as to the sanity of a testator, the court charged the jury that if the evidence was evenly balanced, they should consider the presumption of sanity as evidence, and find in favor of the will. *Held*, no error. *Appeal of Sturdevant*, 42 Atl. Rep. 70 (Conn.).

It seems impossible to support either the reasoning or the conclusion of the court. While the court admit that the ultimate burden of establishing the sanity of the testator is on the person propounding the will, *Crowninshield* v. *Crowninshield*, 68 Mass. 524, yet the effect of the charge must be to direct a verdict in favor of the will if the evidence is evenly balanced, although it is evident that in such a case the verdict should be against the party having the burden of establishing sanity. *Sutton* v. *Sadler*, 3 C. B. N. S. 87. While it is often said that presumptions are evidence, this is incorrect and has led to much confusion. See *Coffin* v. *U. S.*, 156 U. S. 432; *Allen* v. *U. S.*, 164 U. S. 492; *Agnew* v. *U. S.*, 165 U. S. 36. The legitimate effect of the presumption of sanity seems to be merely to make out a *prima facie* case, and to put the burden of coming forward with evidence on the other party. But when all the evidence is brought in, although the fact on which the presumption is based may be evidence, namely, the fact that most men are sane, yet the presumption itself is not evidence, being merely an inference drawn from that fact. Thayer, Prel. Treat. Evid., 551–576.

GIFT OF NON-NEGOTIABLE INSTRUMENTS. — A non-negotiable banker's receipt with a power of attorney indorsed was given by a father to his son, and later the son was appointed his executor. At the father's death the son collected the deposit in his own right. *Held*, that the son may hold the deposit. *Re Griffin*, 79 L. T. Rep. 442. See NOTES.

INSURANCE — FORFEITURE — WAIVER. — An insurance policy provided that in case insurance in excess of a certain sum should be placed on the property insured, the policy should be void. Such an excess sum was placed. After loss, however, the insurance company, although having notice of the breach of the condition, did not claim the forfeiture, but proceeded to determine the loss. In an action on the policy, *held*, that the company is liable. *British-America Assurance Co.* v. *Bradford*, 55 Pac. Rep. 335 (Kan., Sup. Ct.).

The court held the company liable on the ground that by its acts it had waived the right to claim a forfeiture. There was no consideration nor any acts on which to base an estoppel, and in Bigelow, Estoppel, 3d ed., 568, it is said that such a waiver is of no effect; this view is supported by some early cases. *Ripley* v. *Ætna Insurance Co.*, 30 N. Y. 136. The principal case, however, seems to be correct in holding that neither of these elements is necessary to make a waiver binding. *Titus* v. *Glens Falls Insurance Co.*, 81 N. Y. 410. A surety may become liable by waiving a defence given him by the fact that his creditor has given time to the principal debtor. *Hooper* v. *Pike*, 72 N. W. Rep. 829 (Minn.). An indorser of a bill of exchange may in the same way waive the laches of the holder in notifying him of dishonor. *Allen* v. *Brown*, 124 Mass. 77. Generally where one has a defence he may waive it, and the principal case is but another illustration of this rule.

PARTNERSHIP — SHARING PROFITS AS TEST. — One of the defendants advanced money to the other to be used in a business enterprise, and the latter agreed to return the principal with interest and one-third of the profits of the business. *Held*, that this made them partners as to third parties, although both defendants intended a loan merely, and not a partnership. *Dilley* v. *Abright*, 48 S. W. Rep. 548 (Tex. Civ. App.).

The decision follows *Cothran* v. *Marmaduke*, 60 Tex. 370, the force of which was somewhat weakened, however, by *Buzard* v. *Bank*, 67 Tex. 83. The doctrine adopted by the court, making a sharing in the profits, except as payment for services, conclusive evidence of partnership, once prevailed in both England and America. *Grace* v. *Smith*, 2 W. Bl. 998; *Waugh* v. *Carver*, 2 H. B. L. 235; *Haas* v. *Roat*, 16 Hun, 526. It was overthrown in England by *Cox* v. *Hickman*, 8 H. L. Cas. 268, and cases following it, and has been almost universally abandoned in this country. *Curry* v. *Fowler*, 87 N. Y. 33; *Le Leore Castagnio*, 5 Colo. 564. The true doctrine is that profit-sharing is only *prima facie* evidence of a partnership, and the real intention of the parties finally governs. 1 Bates, Partnership, §§ 15, 23, 47. It may be just that one who loans money for a share of profits should be postponed to other creditors, but the proper way to reach this result is by statute, as is done in England by Bovill's Act.

PROCEDURE — HABEAS CORPUS — APPEAL. — A petitioner for a writ of *habeas corpus* appealed from an order remanding him to imprisonment. *Held*, that the North Dakota statutes do not authorize appeals in *habeas corpus* cases. *Carruth* v. *Taylor*, 77 N. W. Rep. 617 (N. Dak.).

Whether appellate jurisdiction exists in *habeas corpus* cases has proved a most troublesome question both in England and in the United States. At common law, the weight of authority on both sides of the Atlantic is against the allowance of a writ of error to a decision on *habeas corpus*. *City of London's Case*, 8 Co. 121 b; *Coston* v. *Coston*, 25 Md. 500. *Contra*, *Yates* v. *People*, 6 Johns. 337. The right of appeal in actions at law being purely statutory, the question in the principal case was entirely one of interpretation, and the court follows the prevailing doctrine in holding that statutes conferring the right of appeal in general terms do not apply to *habeas corpus* proceedings. *Bell* v. *State*, 4 Gill, 301. But see *Holmes* v. *Jennison*, 14 Pet. 540. If appeals were allowed by the petitioner, probably they would have to be allowed against him; and if a decision in his favor were subject to stay pending an appeal, the writ of *habeas corpus* would lose much of its prompt remedial character. In many States the matter is regulated by express statute.

PROPERTY — COVENANT OF TITLE — DAMAGES. — X conveyed an undivided one-half of certain land to plaintiff by warranty deed. The conveyance was by metes and bounds, and purported to pass an interest in 150 acres, though in fact the tract contained but 100 acres. X afterward acquired title to the other one-half, from whom defendant purchased it with notice of X's conveyance to plaintiff. In a suit for partition, *held*, that the tract should be equally divided between plaintiff and defendant. *Doyle* v. *Brundell*, 41 Atl. Rep. 1007 (Pa.).

The court below held that as X purported to convey a one-half interest in 150 acres by warranty deed, plaintiff should take 75 acres, as defendant, taking with notice, was bound by the equities between plaintiff and X. This view cannot be supported. It would result in giving defendant's land to the plaintiff for a breach of X's covenant of warranty. Where one conveys land to which he has no right he is estopped to deny the grantee's interest, and if the grantor afterward gets title it feeds the estoppel and goes to the grantee. *Christmas* v. *Oliver*, 10 B. & C. 181. Here, however, the land afterwards acquired did not come within the description of the first deed, so that the plaintiff could get no land on the principle of estoppel. The decision of the upper court is clearly the correct one.

PROPERTY — EQUITABLE MORTGAGES — DEPOSIT OF TITLE DEEDS. — *Held*, that a mere deposit of title deeds as security for a debt does not create an equitable mortgage. *Parker* v. *Carolina Savings Bank*, 31 S. E. Rep. 678 (S. C.).

It is settled law in England that a deposit of title deeds for the purpose of security without any written memorandum of the transaction, gives rise to an equitable mortgage. *Russel* v. *Russel*, 1 Bro. C. C. 269. The legal effect of the deposit is a contract that the depositor's interest in the land shall be liable for the debt. *Pryce* v. *Bury*, 2 Drew. 41. Where deeds are the only muniments of title, and their possession an important factor in determining it, as in England, there is some reason for attributing to a deposit of them the creation of a lien on the land. In the United States, where possession of deeds is of no consequence so far as title is concerned, there is no reason for such a doctrine. Apparently, however, the English rule has been adopted in Wisconsin and New Jersey. *Jarvis* v. *Dutcher*, 16 Wis. 307; *Gale* v. *Morris*, 29 N. J. Eq. 222. And until the principal case it had been supposed to be law in South Carolina. *Hutzler* v. *Phillips*, 26 S. C. 136.

PROPERTY — RELIGIOUS SOCIETIES — CHANGE OF DOCTRINE. — The members of a church, for whose benefit property had been donated in trust, split into two factions owing to a disagreement as to the correct doctrines to be taught. *Held*, that the members who adhere to the doctrines taught at the time of donation are entitled to the property, however small a minority they may be. *Peace* v. *First Christian Church of McGregor*, 48 S. W. Rep. 534 (Tex., Civ. App.).

The authorities uniformly support the present case, and hold that when property is conveyed to trustees in trust for a particular church, it is dedicated to the principles and doctrines maintained by the church at that time. *App.* v. *Lutheran Congregation*, 6 Pa. St. 201; *McBride* v. *Porter*, 17 Iowa, 203. It might be questioned on principle, however, whether when property is conveyed in trust for such a religious corporation without any express conditions as to the doctrines to be taught, it should not go, in case of the congregation splitting into factions, to that part which by its votes is entitled, by the laws of the corporation to control the government of the church. The principal case, however, is, perhaps, more satisfactory in practice, as donors give to churches usually on account of the doctrines there maintained; and any change in such doctrines, if the present case were not law, would result in an application of the property for purposes other than those which the donor would wish.

PROPERTY — WILLS — CONSTRUCTION OF AMBIGUOUS CLAUSE. — A testatrix bequeathed five thousand dollars to A, and devised and bequeathed the residue of her estate to B. In a codicil she declared: "I hereby revoke the bequest made by me to B, and give the five thousand dollars (heretofore in my will bequeathed to said B) to C." *Held*, that the codicil revoked the bequest to A. *Home for Incurables* v. *Noble*, 19 Sup. Ct. Rep. 226.

The decision, which at first sight appears rather odd, rests upon satisfactory reasoning. A mistake being apparent upon the face of the codicil, the court must construe the revoking clause so as to carry out the intention of the testatrix. An examination of the whole instrument leads to the conclusion that it could not have been the intention to revoke the residuary bequest to B. Hence the word "B" may be stricken out. 2 Williams Executors, 938. And there is sufficient evidence upon the face of the will to justify the court in concluding that the revoking clause was intended to apply to the bequest to A. In the lower court a contrary decision was based upon the argument that the codicil contained two clauses separate from each other, a revocation free from ambiguity, and a bequest that could be rendered effective by disregarding the parenthetical clause. But a conclusive answer to this view is that it disregards the settled rule of construction that the different clauses of a will should be considered in reference to each other. *Lane* v. *Vick*, 3 How. 464.

TORTS — REPLEVIN — ATTACHED PROPERTY. — In a suit against a debtor the sheriff attached goods of his which were exempt from attachment. *Held*, that the statute providing that where goods are taken under execution one, other than the defendant, claiming ownership, may replevy them, was remedial, and that this debtor could not replevy, his goods being *in custodia legis*. *Prescott* v. *Starkey*, 41 Atl. 1021 (Vt.).

The common-law rule that goods *in custodia legis* cannot be replevied has been laid down in its broadest extent. *Kittredge* v. *Holt*, 55 N. H. 621; *Isley* v. *Stubbs*, 5 Mass. 280. The rule, however, is founded on grounds of public policy; that to allow replevin would only lead to circuity and deprive the creditor of his security. It is clear that the reasoning does not hold when goods of a third party have been wrongfully seized in execution, and the better view seems to be that at common law such property might be replevied by the true owner. *Winnard* v. *Foster*, 2 Lutw. 1191; *Rooke's Case*, 5 Coke, 99; *Clark* v. *Skinner*, 20 Johns. 465. By parity of reasoning the replevy of goods exempt from attachment should be allowed, and such a view has been taken in some cases. *Durch* v. *Rahner*, 61 Ind. 64; *Frazier* v. *Syas*, 10 Neb. 115; *Ross* v. *Hawthorne*, 55 Miss. 551. The whole question has been largely dealt with by statute.

TORTS — WILFUL WRONG — AVOIDABLE CONSEQUENCES. — The plaintiff was wrongfully riding on the footboard of defendant's engine. The engineer wilfully turned steam on him, whereupon he jumped to the next car, but slipped and was injured. *Held*, that since the act of the engineer was a wilful assault, the defendant is liable for the injury, irrespective of whether the plaintiff exercised ordinary care in jumping. *Galveston, etc. Ry. Co.* v. *Zantzinger*, 48 S. W. Rep. 563 (Tex. Sup. Ct.).

The theory of the decision is that when the defendant's act is intentional and wilful it is the proximate cause, unless the plaintiff is guilty of wilful or gross negligence in failing to avoid the consequences thereof. Where the defendant's act is negligent the plaintiff is under a duty to use ordinary care to avoid the consequences. *Hogle* v. *New York, etc. R. R. Co.*, 28 Hun, 363. Likewise, where the defendant's act is illegal. *Flower* v. *Adam*, 2 Taunt. 314. There is a tendency to hold a defendant for more remote consequences when his act is intentional, but to relieve the plaintiff, in such a case, from all duty to exercise ordinary care is inconsistent with the doctrine of avoidable consequences. It seems, therefore, that it should have been left to the jury to determine whether the plaintiff, in what he did, acted reasonably, or whether he was so deprived of his presence of mind as to render his act irresponsible, *Jones* v. *Boyce*, 1 Stark, 493; *Woolley* v. *Scovell*, 3 Man. & Ry. 105.

REVIEWS.

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This volume consists mainly of a number of lectures and addresses delivered by the author during the last twenty-five years. They discuss